Criminal Law

Success of automatism defence for sex assaults 'pretty low': Stilman

By Peter Small, AdvocateDaily.com Contributor

An Ontario court decision allowing the defence of automatism caused by extreme inebriation in sex assault cases does not mean it’s open season on women, says Toronto criminal lawyer Jacob Stilman.

Superior Court Justice Nancy Spies did not rule that extreme intoxication, as reported in some accounts, on its own can be used as a defence against charges of sex assault, Stilman says.

“It’s not a defence of intoxication. It’s a defence of intoxication to the point of automatism, and that's very different,” says Stilman, partner with Lo Greco Stilman LLP.

“Automatism is a completely dissociated state where you don't know what you're doing. You truly lack all objective awareness of your actions,” he says.

“Intoxication alone is not a defence to sexual assault. A person who is intoxicated may have become highly dis-inhibited and engaged in criminal behaviour, but that it not 'automatism,' and would not give rise to a defence in law," says Stilman. "Also, being blacked out after the fact on account of extreme alcohol consumption doesn’t mean that the person was in a state of automatism at the time.

“If some frat boy gets himself drunk and thinks that he can rely on an intoxication defence after the fact, he will be in for a rude awakening," Stilman adds.

Nor does the ruling break significant new ground, Stilman says. “This issue has already been determined multiple times at the Superior Court level, in several provinces”

It’s also important to note that the automatism defence has not been decided in this case, Stilman adds. The judge is merely allowing the defendant to try to establish it at trial, he says.

Spies ruled that she is bound by an earlier decision by a judge of her court that found s.33.1 of the Criminal Code — which bars the defence of self-induced intoxication in cases that involve an element of an assault — is unconstitutional and of no force or effect. Three other Ontario judges have also found that the section breaches the Charter, Spies said.

The issue has never been decided by an appeal court, she noted.

Spies separately considered, on its own merits, whether s. 33.1 infringes ss. 7 and 11(d) of the Charter, which protect the rights of life, liberty and the security of the person and the presumption of innocence. She concluded that it does breach those rights in that it allows conviction where the court may have a reasonable doubt as to the guilt of the accused.

Her decision has been widely reported as restoring the defence of extreme intoxication in sexual assault cases and has sparked alarm in some quarters.

The head of the London Abused Women’s Centre, Megan Walker, told Blackburn News she is shocked and angered by the ruling. “I think it is appalling that any judge can say that men who are intoxicated can use that as justification to rape women.”

Amanda Dale, executive director of the Barbra Schlifer Commemorative Clinic, told Canadian Press the decision sees courts taking a backwards step towards “a culture of myths and discrimination” related to sexual assault.

But Stilman says we need not fear that people will now go out and commit sexual assaults and then plead automatism caused by extreme inebriation. “The likelihood of success of these defences is really pretty low.

“The fact is that to successfully make out this defence at trial, the accused will face an uphill battle every time," he says. "First, the accused has the onus to establish the defence — he doesn’t simply have to raise a reasonable doubt. Second, he is going to have to adduce very credible expert evidence that he was in a true state of automatism, and not simply being drunk and stupid.

"There are not going to be too many experts who are going to go to bat for an accused unless the evidence of automatism in the case is highly compelling,” Stilman says.

The complainant in the case says she was intoxicated and passed out on a couch in the Toronto apartment the defendant shared with her boyfriend, the judge wrote. She awoke to find the defendant sexually assaulting her, according to her evidence.

The defendant claims he consumed alcohol, marijuana and a date rape drug and “performed the sexual acts alleged without having intended to do so,” the judge noted.

In her ruling, Spies relied on a 1994 Supreme Court of Canada (SCC) decision involving an extremely intoxicated man accused of sexually assaulting a disabled woman. The court overturned years of common law precedents prohibiting the use of drunkenness as a defence to negate the *mens rea*, or mental component, in general intent offences such as sexual assault, the judge said.

The Supreme Court held that depriving the accused of the defence of extreme intoxication akin to automatism drastically offends Charter rights to fundamental justice, Spies wrote.

The SCC decision sparked public alarm, leading Parliament to enact s. 33.1 nine months later, Spies noted. The section bars the defence of self-induced intoxication in general intent cases that involve an element of an assault or interference with a person’s bodily integrity.

The SCC set out a stringent reverse-onus test that an accused must meet to succeed in such a defence, Stilman says. First, the defendant must establish, on a balance of probabilities, that he or she was inebriated to the point of automatism. Second, the accused must provide expert evidence.

“You can’t just stand up there and say, ‘I was too drunk.’ There’s going to have to be a scientific basis to what you’re saying,” Stilman says.

Given such hurdles for defendants, people need not be alarmed that it will be open season on women for sexual predators, he says. It will be very rare for the automatism defence to succeed, he says.

“The situation is going to be really few and far between.”